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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 562

GURVAN B. BROWN, Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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TABLE OF CONTENTS OF PETITION

	PAGE
Citation to Opinions Below	1
Jurisdiction	2
Question Presented	2
Rule Involved	2
Statement of the Case	4
Reasons for Granting the Writ	9
First Point: If a railroad succeeds in persuading a jury to award only modest damages by representing at the trial of a case that they intend to keep an injured employee in service, and then after trial, with no change in his physical condition, hold him out of service solely on the basis of his medical testimony, the purposes of the F.E.L.A. will be frustrated	9
Second Point: If the judgments of the courts below are permitted to remain, Respondent and other railroads can and probably will employ the same tactics in future litigation, misleading juries as to future employment of employees, who though injured, are able to resume working after the accident up until the time of trial	10
Third Point: The decisions of the courts below show a callousness to the plight of the railroad employee in the instant case and an indifference to the intentions of Congress as interpreted by this Court such as to justify this Court's supervision and correction of them	11
Conclusion	12
Appendix:	
Opinion, U. S. Court of Appeals (3)	13
Judgment, U. S. Court of Appeals (3)	23

TABLE OF CASES

PAGE

Adams v. American President Lines, 146 P. 2d 1, 23 Cal. 2d 681 (1944) 10

Baltimore & Ohio Railroad Co. v. Branson, 98 A. 225, 128 Md. 678 reversed on other grounds 242, U.S. 623, 61 L.Ed. 534 37 S. Ct. 244 (1916) 10

Carpenter v. Atchison T. & S. F. Ry. Co., 240 P. 2d 5. 109 C.A. 2d 18 (1952) 10

Colasurdo v. Central R. Co., C.C. (NY) 180 F. 832, (1910) affirmed, C.C.A. (1911) 192 F. 901, error dismissed, 226 U.S. 617, 57 L.Ed. 383 33 S. Ct. 111 (1912) 10

Crecelius v. Chicago M. & St. P. Ry. Co., 223 S.W. 413, 284, Mo. 26 (1920) 10

Graham v. Thompson, (Mo.) 212 S.W. 2d 770 (1948) 10

Johnson v. Southern Pacific, 196 U.S. 1, 49 L.Ed. 363, 25 S. Ct. 158 (1904) 10

Lukon v. Pennsylvania R. Co., 131 F. 2d 327 (3rd Cir. 1942). 10

Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326, 2 L.Ed. 2d 799, 78 S. Ct. 758 (1958) 10

St. Louis I.M. & S. Ry. Co. v. Conley, 187 F. 949, 110 C.C.A. 97 (Ark. 1911) 10

Urie v. Thompson, 337 U.S. 163, 93 L.Ed. 1282, 69 S. Ct. 1018 (1949) 10

Wilkerson v. McCarthy, 336, U.S. 53, 93 L.Ed. 497 69 S. Ct. 413 (1949) 12

TABLE OF TEXTS, AUTHORITIES AND STATUTES

60 Congressional Record 4530 11

Fed. R. Civ. P. 60 (b) 2

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PENNSYLVANIA RAILROAD COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, GURVAN B. BROWN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on September 13, 1960.

CITATION TO OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 179 F. Supp. 858 (Appellant's Appendix 92a). The opinion of the Court of Appeals for the Third Circuit is reported in 282 F. 2d 522 and is printed in Appendix hereto, infra, p. 13.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1960, infra, page 23. The jurisdiction of this court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Whether the purposes and intendment of the F.E.L.A. do not demand that a new trial should be granted on the issue of damages where the railroad, after modest verdict against it, held the employee out of service solely on the basis of his doctors' testimony, contrary to the railroad's representation to the jury that the railroad would allow him to continue to work, and where the court instructed the jury that the plaintiff's work would not be affected by anything that occurred during the lawsuit.

RULE INVOLVED

Rule 60: Relief from Judgment or Order

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On Motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule (59b); (3) *fraud (whether heretofore denominated intrinsic or extrinsic), misrepresenta-*

tion, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." (28 U.S.C.) (Emphasis by Petitioner)

STATEMENT OF THE CASE

Petitioner was injured twice in the course of his employment as a conductor for Respondent and the cases were consolidated for trial in the United States District Court for the Western District of Pennsylvania, jurisdiction arising under the Federal Employers' Liability Act. Although Petitioner had lost no time as a result of the collision which occasioned the first injury in 1953, he lost almost four months' time from work as a result of the severe and sudden stopping of a train in January, 1956. For the second accident Respondent admitted liability, but vigorously contested the extent of Petitioner's damages. Petitioner proved fractured ribs and injury to his upper and lower back, which although serious was conceded by his doctors not to be such in its present condition as would interfere with his continuing to work. The jury returned a verdict for him in the amount of fifteen-thousand ($15,000.00) dollars on April 23, 1959. He continued working at his regular job for several weeks after the case ended, without interruption, just as he had for the three years prior to trial while the case was pending, despite the fact that his injured back required the wearing of a brace and necessitated his regularly taking pills to alleviate the pain in his back and legs. Five weeks after trial, on May 29, 1959, Respondent notified Petitioner that he was being held out of service. This decision was based on the recommendation of Respondent's regional medical officer after his being furnished with a trial transcript of the testimony of one of Petitioner's doctors regarding his physical condition. No examination of the Petitioner was made by the Respondent's doctor at any time following the trial.

At the trial of the case, when Respondent's counsel was addressing the jury, he gave assurances, consonant with the opinion of the railroad doctors, that the Petitioner had completely recovered from any injuries sustained in the accidents and could continue working without fear of harm, as follows:

> "We know that his working time with the Pennsylvania Railroad will end when he becomes sixty-five, which will be two years from next February, which would be February, 1962, under the contract with the Brotherhood of Railroad Trainmen. A man loses his seniority and the younger fellows step in when he becomes sixty-five.
>
> I feel and urge you to consider Dr. Berkman's testimony. He believes his pain will be less, not greater, and he will go on and work steadily as he has in the past and that he will have an old age retirement in which he can do some work if he sees fit. . . ." (64a)

When counsel for Petitioner was making his closing remarks to the jury, following the summation by counsel for the railroad, he reminded the jury that plaintiff was able in his present condition to go on working, but asked them in their consideration of damages, to take cognizance of the possibility that if plaintiff's condition worsened the railroad might not allow him to continue. (See pages 66a-67a, Appellant's Appendix) At that point, while he was posing the question of Respondent's pulling him out of service if his condition worsened, counsel for the railroad interrupted and objected to the argument as improper and not warranted by any evidence in the case. He said,